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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re B.M., a Person Coming Under the Juvenile Court Law.	H046404 (Santa Clara County Super. Ct. No. 118JV43289)
THE PEOPLE, Plaintiff and Respondent, v. B.M., Defendant and Appellant.	

B.M. was adjudged a ward of the juvenile court following a negotiated plea agreement. The juvenile court committed B.M. to a rehabilitation program subject to a variety of conditions. On appeal from the dispositional order, B.M. challenges one of his conditions as unconstitutionally vague and overbroad. We modify the condition as discussed below and affirm the dispositional order as modified.

I. FACTUAL BACKGROUND

San Jose police officers responded to a report of an armed robbery at a liquor store on Story Road and found B.M. standing in the parking lot with approximately eight other people.[1] The liquor store manager identified B.M., who was holding a bottle of champagne in his right hand. B.M. began to walk away as the officers approached.

[1] We summarize the facts as reported in the probation report filed with the juvenile court on November 5, 2018.

The officers arrested B.M. and searched him for weapons, finding a 3.5-inch fixed blade knife in a sheath on his waist band, covered by his shirt. The victim from the liquor store told the officers that he saw B.M. conceal a $40 bottle of champagne in his clothing. When he tried to stop him from leaving the store, B.M. produced a knife from his waistband and " 'may have' " held it up at him. The victim positively identified the knife found on B.M. as the one used in the robbery.

During an interview with police, B.M. said that he wanted to impress the friends he was hanging out with by stealing alcohol from the store. He walked in and put a bottle of champagne in his pants but was confronted by a clerk when he tried to leave. He grabbed his knife from the sheath and held it down at his side and continued to walk out of the store. He did not threaten anyone with the knife. B.M. knew that the knife was concealed by his shirt and that "by law" he was not supposed to have the knife concealed. B.M. admitted to being associated with the Norteño criminal street gang but denied belonging to a "crew" or "hood."

II. PROCEDURAL BACKGROUND

A juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) was filed on August 21, 2018, alleging that B.M. had committed second degree robbery (Pen. Code, § 212.5, subd. (c); count 1) and possession of a dirk or dagger (Pen. Code, § 21310; count 2), both felonies. At the jurisdictional hearing on October 22, 2018, the juvenile court granted the district attorney's motion to amend the petition, adding a felony count of attempted robbery in the second degree (Pen. Code, §§ 664, 211, 212.5, subd. (c); count 3). B.M. admitted the allegations of possession of a dirk or dagger and attempted robbery (counts 2 & 3) pursuant to a negotiated plea, and the court found those counts to be true. The district attorney dismissed the second degree robbery allegation (count 1).

At the disposition hearing on November 5, 2018, the juvenile court declared B.M. a ward of the court based on the sustained counts 2 and 3 and noted the maximum term of confinement was three years, eight months. B.M. received 40 days of credit. The court

adopted the recommendations of the probation report, modified in part, and committed B.M. to "the Ranch" (Juvenile Rehabilitation Facilities, Enhanced Ranch Program) subject to enumerated conditions.

The defense objected to probation's recommended condition No. 20, pertaining to possession of a dangerous or deadly weapon. As stated in the probation report, the condition required that "said minor not knowingly own, use, possess, or have control over an object that is dangerous or deadly such as a knife, blackjack or dirk *or an item that is not necessarily deadly or dangerous such as a bat, chair, or car but the minor intentionally owns or possesses the item because it is capable of being used in a dangerous or deadly manner with the intent of using it in such a manner*." (Italics added.) B.M. argued that "as written," condition No. 20 was overly broad and vague. The juvenile court in response observed that "probably the alleged ambiguity starts with after the word 'bat.' " The court struck the remaining part of the sentence after the word "bat."

B.M. filed a timely notice of appeal on November 9, 2018.

III. DISCUSSION

On appeal, B.M. contends that condition No. 20 is vague and overbroad, in violation of his constitutional right to due process. He argues that while his trial counsel did not renew her objection to the condition as modified by the juvenile court, the issue is not forfeit because the asserted error may be resolved as a matter of law, without reference to the sentencing record in the trial court.

A. NO FORFEITURE

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880 (*Sheena K.*).) The general rule of forfeiture "applies in the context of sentencing as in other areas of criminal law." (*Id.* at p. 881.) There is an exception, however, when "an appellate claim—amounting to a

'facial challenge'—that phrasing or language of a probation condition is unconstitutionally vague and overbroad . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Id*. at p. 885.) Accordingly, a Court of Appeal may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*Id*. at pp. 888-889.) Our review of a constitutional challenge to a probation condition is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

This case presents such a facial challenge to the constitutionality of a condition to which the defendant failed to object below. The People argue that the exception to the forfeiture rule is inapplicable here and that B.M. should not be permitted to challenge condition No. 20 because, although defense counsel objected to the condition as originally worded in the probation report, B.M. "accepted" the juvenile court's modified version.

The People's position is unsupported by any reference to case authority. Moreover, as B.M. points out, application of what appears to be an argument under the "invited error" doctrine would be misplaced. " 'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) In that case, the court applied the doctrine in rejecting the defendant's challenge on appeal to the allegedly improper excusal of a prospective juror, noting that the defendant "did not merely acquiesce, but affirmatively joined in the challenge to Prospective Juror B., and thus cannot be heard to claim the court erred in excusing her." (*Ibid*.)

Here, by contrast, B.M. is not seeking a reversal on appeal and did not affirmatively and for tactical reasons request the modification to the challenged condition. At most, B.M. "merely acquiesce[d]" (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 49) by failing to renew his objection after the court ruled on the objection by striking the latter part of the condition. Because B.M.'s challenge to condition No. 20 "is capable of correction without reference to the particular sentencing record developed in the trial court," we find that it presents a pure question of law proper for consideration on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at p. 887.)

B. THE CONDITION SHOULD BE MODIFIED

B.M. maintains that the condition, as worded, is vague because it lacks reasonable specificity and is overbroad because it unnecessarily limits his constitutional right to due process. The condition provides in full: "That [B.M.] not knowingly own, use, possess, or have control over an object that is dangerous or deadly such as a knife, blackjack or dirk or an item that is not necessarily deadly or dangerous such as a bat."

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A probation condition is unconstitutionally vague when people of common intelligence must guess at its meaning and might differ as to its application, violating " 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice' " to the probationer. (*Ibid.*) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Ibid.*) Also, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Ibid.*) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and

the burden it imposes on the defendant's constitutional rights . . . ." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 (*E.O.*).)

B.M. argues that the condition's dual references to a "dangerous or deadly [object] such as a knife, blackjack or dirk" and to "an item that is not necessarily deadly or dangerous such as a bat" are confusing and insufficiently precise to know what is required of him. He contends that because case law has defined the term " 'deadly weapon' " as it relates to the item's ability to produce death or great bodily injury (see *In re R.P.* (2009) 176 Cal.App.4th 562, 567 (*R.P.*)), it is unclear whether the condition also prohibits him from owning, using, possessing or having control over a bat or other such item even if it is *not* being used in a dangerous or deadly manner. He argues that given the uncertain range of potentially prohibited items, the condition is also unconstitutionally overbroad. He contends that simply using or possessing an item like a golf club if playing golf, or a hockey stick if playing hockey, might be interpreted as a violation of the condition even if his use or possession of the item is innocuous.

The People respond that read in context, the objects are proscribed only if B.M. intends to use them as weapons. The People suggest that if further clarity is needed, we may modify the condition to prohibit only items that are "not necessarily deadly or dangerous if possessed with the intent to use it as a weapon." B.M. acknowledges that modification of the condition to include intent would address his constitutional concerns.

We agree that modification is proper to avoid a constitutional vagueness violation. In *R.P.*, the court considered whether a probation condition prohibiting a minor from possessing "any 'dangerous or deadly weapon' " was unconstitutionally vague. (*R.P.*, *supra*, 176 Cal.App.4th at p. 565.) The court examined both statutory and other legal definitions of " 'dangerous or deadly weapon' " and its variants and found that the "definition encompasses inherently deadly items such as dirks and blackjacks which are specifically designed as weapons . . . , *as well as other items that are not deadly per se but which may be used in a manner likely to cause death or great bodily injury*." (*Id.* at

p. 567.) Given the "clearly established" legal definitions of a deadly or dangerous weapon, the court rejected the minor defendant's contention that the probation condition prohibiting possession of such items was insufficiently precise. (*Id*. at p. 568.)

Applying the established legal definition of a deadly or dangerous weapon to the condition imposed here, however, leads to uncertainty. While the first part of the condition ("[t]hat [B.M.] not knowingly own, use, possess, or have control over an object that is dangerous or deadly such as a knife, blackjack or dirk") applies to an object used in a manner capable of producing, and likely to produce, death or great bodily injury (*R.P.*, *supra*, 176 Cal.App.4th at p. 567), the next part of the condition (that B.M. not knowingly own, use, possess, or have control over "an item that is not necessarily deadly or dangerous such as a bat") extends the prohibition to an "item" that is *not* necessarily capable of producing death or great bodily injury. This wording fails to provide fair notice of what is required of B.M., because an item that is "not necessarily dangerous or deadly like a bat" might refer to *any* imaginable item. The condition fails to specify either the qualities of the not-necessarily-deadly-or-dangerous item or the manner of possessing or using the item that would inform B.M. of what he is to avoid owning, using, possessing, or controlling.

The lack of notice is like that in *Sheena K.*, where the California Supreme Court found the probation condition that the "defendant not associate with anyone 'disapproved of by probation' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890) was unconstitutionally vague because it did not "notify [the] defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer" (*id*. at pp. 891-892). Just as the defendant in *Sheena K.* could not be expected to avoid associating with people who she did not know she was required to avoid, B.M. in this case cannot know under what circumstances he is to avoid owning, using, or possessing an object that is "not necessarily deadly or dangerous" but, like a bat, is capable of producing death or great bodily injury if wielded with dangerous intent.

To reduce the risk that B.M. might be found in violation without adequate notice, we will modify the condition to include the scienter element proposed by the parties.

Having found the condition to be unconstitutionally vague, we need not address B.M.'s overbreadth argument in which he largely repeats the due process concern raised in his vagueness argument. (See *E.O.*, *supra*, 188 Cal.App.4th at p. 1153 [noting that vagueness and overbreadth are often raised together but are "conceptually quite distinct"].)

IV. DISPOSITION

The dispositional order is modified to amend condition No. 20, as follows: That said minor not knowingly own, use, possess, or have control over an object that is dangerous or deadly such as a knife, blackjack or dirk; or knowingly own, use, possess, or have control over an item that is not necessarily deadly or dangerous such as a bat, if possessed with the intent to use it as a weapon.

As so modified, the order is affirmed.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.

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